Positive Law and Natural Law

Author(s): Sergio Cotta

Source: *The Review of Metaphysics*, Dec., 1983, Vol. 37, No. 2 (Dec., 1983), pp. 265-285

Published by: Philosophy Education Society Inc.

Stable URL: https://www.jstor.org/stable/20128007

POSITIVE LAW AND NATURAL LAW

SERGIO COTTA

I DO NOT INTEND to present, in this paper, either a renewed account of the classical doctrine of natural law, or a modern version of its foundation in human nature. This does not mean that I consider superfluous or meaningless both these tasks. Indeed, I am convinced that the notion of natural law is still important for a full understanding of what we mean by "law." Natural law could be interpreted, for instance, as the transcendental (in the Kantian sense) condition of legal experience. And metaphysics—as the "ultimate knowledge of being," to put it in Edmund Husserl's terms[1]—could prove that the being of man, analyzed in its structure, offers a convincing ontological foundation of the law.[2]

But this paper has a more modest purpose. First, I want to discuss and criticize the deep rooted conviction of legal positivism that "natural law" is a senseless notion, and therefore that law must be reduced to *positive* law. Secondly, I intend to show that any legal norm (either positive or "natural") is obligatory on the ground of a rational justification related to an existential situation (an is-situation): this seems to me the fundamental link between positive and natural law. Finally, I state the difference between these two laws in terms of different, but not incompatible, human contexts: particular and universal.

In other words, I have put the problem of the relationship between positive and natural law in the frame of a theory of the justification of norms. This last is a subject that I have first sketched in my paper "Le Problème de la Justification Scientifique des

---

[1] See E. Husserl, *Méditations cartésiennes*, (Paris: J. Vrin, 1969), p. 118.

[2] See my article, "La coesistenza come fondamento ontologico del diritto," in *Rivista Internazionale di Filosofia del Diritto*, 58 (1981): 256–267.

Review of Metaphysics 37 (December 1983): 265–285.

Normes"[3] and have more extensively developed in my book *Giustificazione e Obbligatorietà delle norme.*[4]

1. The naturalistic fallacy does not invalidate the function of natural law.

The criticism of the very concept of natural law, which starting from the nineteenth century has been typical of large sectors of contemporary philosophy, seems to have achieved today a final success through analytical philosophy and its ethical non-cognitivism. The argument against natural law proposed by this philosophy is more or less the following. The notion of natural law points to a law (i.e., an *Ought*, in German, a *Sollen*) which is conceived as implied in, or deduced from, an *is*-situation: that of nature. Therefore, unlike the positive law—an *Ought*, which having its source in human will remains always within the realm of a normative, prescriptive discourse—natural law draws its validity from a theoretic or alethic discourse concerning nature.

But given the "great division" between cognitivism and non-cognitivism, between *Is* and *Ought*, and according to the principle of the naturalistic fallacy, it is logically incorrect to move from one level to the other and to deduce an *Ought* from an *Is*.

Two consequences ensue from this principle. First, "natural law" is a self-contradictory and misleading term: in fact, if it denotes a "law" (ought-statement), this cannot be "natural" (is-statement) and vice versa. Second, natural law, as pertaining to the *Is*-domain, is useless: not being apt to imply, or to provide the foundation of, positive law, which belongs to the *Ought*-domain, it cannot accomplish the directive and critical function traditionally considered its own.

For the moment, I shall leave aside the question of what is meant by "nature" in the jusnaturalistic (or natural-law) tradition, since the manifold schools within it have given to this notion very different meanings. I will only mention here, that very seldom has this notion been thought as implying an absolute determinism, which would fully support the argument of the analytical philosophy. In

---

[3] S. Cotta, "Le Problème de la Justification Scientifique des Normes," *Rivista Internazionale di Filosofia del Diritto*, 51 (1979): 5–20.

[4] S. Cotta, *Giustificazione e Obblagitorietà delle norme* (Milano: Giuffrè, 1981).

this thesis I shall concentrate my attention on the *function* traditionally attributed to natural law (whatever the meaning of "natural") vis-à-vis positive law. From this point of view, as I hope to demonstrate, the argument of the analytical philosophy is based on a misunderstanding.

First of all, we must acknowledge that both from a historical and a philosophical point of view, natural law is (and has been conceived as) the *Ought* compared to the *Is* of positive law. Surely the latter has a normative nature (being a system of norms) and therefore pertains, from a logical point of view, to the *Ought*-domain; but because of its positive nature it is an *Ought* having a factual existence and therefore a historical, empirically ascertainable, and describable reality. And it is exactly to this positive (i.e., factually enacted) norm that natural law is opposed (or proposed) as indicating what the former *ought* to be.

From a historical point of view there are enough proofs that the natural law idea was born in times when the traditional customs and rules of one culture (that is, the existing positive law), being confronted by other cultural and legal systems, ceased to be perceived as the only existing or possible law. At this point, the notion of natural law was developed as the *Ought*-system (be it legal or ethical it makes here little difference) having the function of directing and modifying the factual reality of local legal systems.

This is exactly what happened in the ancient Greek world when the *poleis* had expanded their external interactions outside their own cultural area. And the same has happened again with the occurrence of similar historical situations. It is well known that a renewed interest for natural law followed, particularly in Spain, the discovery of the New World, whose cultural and juridical heterogeneity had shaken the acquired certainties of the European legal culture. In our days again the concept of natural law is explicitly or implicitly evoked in order to eliminate racial discrimination.

From a philosophical point of view, natural law has been, and still is, conceived as what is concealed vis-à-vis what is apparent (I am thinking of Plato's essence hidden by existence); as what was and is no more (the law of the state of nature) compared to what is (the law of the civil society); or finally as the ideal as opposed to the real. But beyond these differences, natural law is always related to positive law as what *ought to be* (discovered, reestablished,

made actual, etc.) vis-à-vis what *is* (apparent, established, factually performed, etc.).

The formal argument of analytical philosophy does not therefore invalidate the *function* of a "natural" law. Since positive law has a factual existence and pertains therefore to the *Is*-domain, we will not fall into the naturalistic fallacy by thinking of natural law as the ought of positive law, i.e., as its normative criterion. Two questions, however, remain to be answered: first, can this *Ought* be correctly called a law, and secondly, this being the case, can it be called natural? I shall soon consider these two questions. Now it is enough to underline the fact that the function of the so-called natural law is not only legitimate but also ethically necessary. Otherwise positive law, just by the fact of its being, would be at the same time what it ought to be. But in that case we would fall precisely into the naturalistic fallacy.

2. The concepts of natural and positive law are mutually compatible.

At first glance, between natural and positive law there seems to be a radical incompatibility. And in fact both jusnaturalists and juspositivists tend to define them by way of opposition. Very briefly it can be agreed that positive law, by being changeable, particular, voluntaristic, artificial (in the sense that it is made by man), is radically opposed to natural law—which is conceived as unchanging, universal, and a product of reason or nature. To put it in a nutshell, we face the well-known distinction between culture (or history) and nature. On the basis of this opposition, juspositivists often reach the conclusion that a natural law is inconceivable. This conclusion, however, is not well grounded. In fact the above mentioned opposition is of a logical nature and therefore means only that what is predicated of positive law cannot be predicated of natural law and vice versa. But it does not authorize the denial of the existence of *two* legal systems or *two* legal levels, each with specific predicates. An insuperable contradiction would exist if, and only if, there was *but one* legal system or legal level. Obviously in that case, if the law was changeable, particular etc., it could not be at the same time unchanging, universal, etc.: the first proposition being true, the second would necessarily be false, and vice versa.

In this regard I would like to underline the fact that in most

cases jusnaturalists, even if conceiving the characters and predicates of natural and positive law as logically opposed to one another, do not draw from this the conclusion that positive law is unthinkable or even less nonexistent. Quite to the contrary, they normally believe that there are two systems, each one related to a different level of human juridical experience. For instance: human rights pertain to the level of natural law, citizen's rights to that of positive law. From this perspective the logically contrasting predicates of the two juridical systems do not imply at all that one or the other of them does not really exist. On the contrary, they remain equally possible and (at least in principle) mutually compatible.

A second point can here be raised. Attributes and predicates currently used for defining both natural and positive law can in fact be brought only by couples. How is it possible to understand or define what is changing without making reference, explicitly or implicitly, to what is unchanging; what is particular without reference to what is universal; what is artificial without reference to what is natural, etc.? In fact what makes understandable each of these terms is their relationship, just as the whole cannot be understood without reference to the part and the part to the whole. To recognize this one does not need to be a Hegelian, or to resort to a dialectical process transforming one attribute into another by way of an *Aufhebung.*

In conclusion I would put forward the hypothesis that positive law is *theoretically* conceivable because natural law is also thought as *theoretically* possible and vice versa. In order to deny the theoretical compatibility of the two laws, one should come to the point of denying that either the unchanging, the universal, etc., or the changeable, the particular, etc., are conceivable. But this is a mistake a jusnaturalist is not likely to make.

3. Natural and positive law are two species of the same genus.

The theoretical compatibility of natural and positive law requires, from a strictly logical point of view, that they could be conceived as two species belonging to the same genus: the genus "law." This is exactly what jusnaturalists have always thought. Let us remember but one famous example: that of Aquinas. In his *Summa Theologiae* he starts by defining the genus *lex* and then goes

on to specify its different classes: *lex aeterna, lex naturalis, lex humana, lex divina.*[5] The fact that the juspositivists too use the expression *positive* law seems to imply that they share the same opinion. For, if such a law requires the attribute "positive" in order to be defined, that means that it is but one species of the genus "law" (*lex simpliciter dicta*). And this species cannot be the only one, otherwise genus and species would be the same thing.

However, the juspositivists assert that the genus "law" does not include natural law but coincides exactly with positive law. The attribute "positive" is therefore to be considered as purely pleonastic: a mere anachronistic residue of the old polemic against the theory of natural law, a polemic which has by now lost its meaning since the non-existence of natural law has been definitively proved. This was already the opinion of K. Bergbohm in the nineteenth century and, in our days, of H. Kelsen, Alf Ross, and many others. Also for the juspositivist, of course, the genus "law" is divided into species (e.g., customary law and statutory law), and sub-species (e.g., international law, national law). But they all belong to the only law the juspositivists admit: the positive law.

This way of answering the question is, however, too simplistic to be acceptable. The total reduction of law to positive law can in fact be achieved only through a highly questionable intellectual process, based furthermore on a vicious circle. The genus "law" is first defined according to the specific characters of positive law: e.g., law is the will of the law-maker or of the people, or what the judges decide, or else an imperative effectively enforceable, and so on. The second step is to show that natural law lacks all these characters. After that comes the more or less triumphant conclusion that there is only one "law," i.e., positive law.

As Hermann Kantorowicz already noted a number of years ago in his book *The Definition of Law*,[6] the acceptance of this point of view would bring as a consequence the exclusion from the history of legal thought of all the jusnaturalist writers and theories. And this would be absurd. Let me add to this that for centuries a law called natural—that is to say neither statutory, nor merely customary, nor of national character—has been to some extent followed

---

[5] See T. Aquinas, *Summa Theologiae*, I-II, qq. 90-91.

[6] H. Kantorowicz, *The Definition of Law* (London: Cambridge University Press, 1958), chap. 2, section 2.

by men and enforced by courts beyond the boundaries of *ius civile*,[7] and is still applied by the ecclesiastical courts of the Catholic Church. And this is a clear proof that it was not considered a pure abstraction or simply an ought-statement of moral nature. To limit therefore the concept of law to positive law would mean to deny it to something that has been considered law not only in the world of theory but also in the world of practice.

From what we have said it follows that, in order to be satisfactory, a definition of the genus "law" must, on one side, break the circularity of the positivist point of view and, on the other side, take into account what has been historically understood and applied as natural law. By the way, we must not forget that the more a general definition is satisfactory and useful, not to say well grounded, the larger is the extent of the empirical phenomena it can interpret and explain. The definition of the genus "law" must then take into account the characters shared by the two types of law that we are discussing.

In spite of their contrasting attributes, both natural and positive law have one element in common. It is the logical structure of the norm which by its deontic nature expresses the (positive or negative) prescription of some form of behavior. Leaving aside their origin (and content), both natural and positive norms take the form of (or in any case may be reformulated as) an ought-statement (in German, a *Soll-Satz*). This is a first step towards understanding the nature of the genus "law."

However, the logical structure of legal propositions is still not enough for deciding whether a prescriptive statement is to be considered truly as law. Let us take, for instance, the following statement: "Give me your purse, otherwise you will be killed by my followers." From a mere logical point of view this is clearly a prescription, not unlike any legal prescription. In fact we can reformulate this statement in the following way, perfectly correspondent to Kelsen's well-known scheme of the juridical norm (if A *is*, then B *ought* to be): "If you do not give me your purse, my followers ought to kill you." However, nobody would think of this prescriptive proposition, of this ought-statement, as a *legal* pre-

---

[7] See G. Gorla, *Diritto comparato. Diritto Comune Europeo* (Milano: Giuffrè, 1981), where ample evidence is given of the enforcement of *ius naturale* by European courts from the XII to the early XIX century.

scription for its addressees, since it does not entail for them an obligation. Such a statement determines only a coercive situation which anybody will try, if possible, to evade without any moral hesitation. And "rightfully," as everybody would easily agree.

What is needed in order to be fully in the juridical realm is that the ought-statement must be able to establish an obligation: or if we want to use the German terminology, which is extremely clear, the *Soll-Satz* must become a *Soll-Norm.* The juspositivist has no doubt at all that positive law prescriptions are obligatory. But the same happens also to the jusnaturalist for what concerns natural law. And this is why this latter has been followed and enforced (even if irregularly) in the course of history. Jusnaturalists go even so far as to say that the binding capacity of natural law norms is even more pure and intrinsic than it is in the case of positive norms. In any case, the fact that their rules are (considered) binding is the second common element of the two legal species.

In a first approximation the genus "law" is thus sufficiently defined by saying that it consists of *obligatory* ought-statements, i.e., *Soll-Normen.* The different source of their obligatory character is what specifies, within the same genus, the two species of natural and positive law. This is a point on which both jusnaturalists and juspositivists agree, at least at the level of theoretical and scholarly debate.

But what are the different sources of their obligatory character? To put it very briefly, the juspositivists believe that the binding nature of positive law depends on its being a *ius in civitate positum.* On the other side jusnaturalists often point to the self-evidence of natural law statements. And that is why they relate them to nature: what is self-evident is what corresponds to our nature. But this argument is illusory: a rule is binding because of the immediate evidence of its *Ought* only when it is purely formal, empty of any content, e.g.: "Do what is good and avoid what is evil." But such a prescriptive statement, more than a veritable rule, is a general regulatory principle. If natural law contained only principles of this kind, it would amount to generalities of limited juridical value. In a very tentative way we might then say that the binding nature of natural law lies in the rationality of its prescriptions—which, by the way, is a fairly classical way of putting it.

From a strictly theoretical point of view the above-mentioned

thesis can be easily defended. But of what use can it be when we come to the interpretation of the real legal experience?

4. The concept of natural law helps to explain certain aspects of the juridical experience.

I will here call attention just to two typical cases in which the notion of a law binding because of its rationality provides a much more satisfactory explanation than the positivist conception of law. The first is the case of the human or *fundamental rights.* Positive law doctrine cannot avoid conceiving them as only *relatively* fundamental, i.e., fundamental *secundum quid* but not *simpliciter* or *überhaupt.* The fact is that from the point of view of this doctrine they cannot have any other basis than either a constitution or an international convention. But that means that they can freely be changed, replaced, or suppressed at the will of the constituent power or of a new international agreement. The conclusion is that positive law is not able to guarantee the unchangeability of such rights against the constituent power or the will of governments. But their unchangeability is precisely what the common conscience attributes to and requires for these rights.

In order to overcome this pitfall, the positivist theorists often make reference to history: it is the development of history (and culture) that brings about the emergence of fundamental rights and makes their unchangeability binding for law-makers. This argument, however, is rather weak. By appealing to history, the risk is in fact to fall again into the naturalistic fallacy. A historical fact, that is to say an *Is*-situation (a *Sein*), would determine the *Ought* concerning the observance of these rights. If, on the other hand, in order to avoid this risk, the binding unchangeability of fundamental rights is made dependent on the *historical reason* (i.e., the reason as interpreter of history), then we are outside the realm of the positive law doctrine. For in that case the *Ought* is based upon its rationality. And finally history cannot be the principle of sufficient reason for ensuring the permanent binding nature of these rights since history means change and therefore is not able to ground anything in a lasting way.

The concept of natural law, on the contrary, provides the common conscience with a much more acceptable interpretation of fun-

damental rights. In fact, according to the natural law doctrine it is precisely *reason* that legitimates these rights as being *simpliciter* fundamental, i.e., that binds the law-maker (be it the constituent power or the international law-maker) to observe them. And this because it is reason that brings into light the ontological (or if one prefers, the onto-existential) structure of man.[8]

One could well, of course, deny the existence of fundamental rights as rights that are not modifiable by positive law. But if one admits their existence, their foundation through the doctrine of natural law is more convincing than through the positivist doctrine.

The second example I want now to consider concerns the duration through time of the binding character of certain rules. How can this fact, so typical of juridical experience, be explained? Can it be attributed, as the positive law doctrine would say, to the use of force, i.e., to a coercive apparatus? In my opinion it cannot be. First of all, force does not support only the binding nature of legal rules: of course force can be used to support and enforce this binding nature, but also to counteract or suppress it. In any case force could produce only a very limited duration of legal rules and only if it were effectively applied. But there are a number of rules, for instance those concerning contracts or trials, that have kept, at least in their hard core, their binding nature over thousands of years and are accepted in a "natural" way. Force has nothing to do with it. It seems a much more reasonable interpretation to admit that only those rules will last that have a trans-historical and not a contingent meaning. But these are precisely the rules the binding nature of which is established and supported by reason in the course of history. Here we come again to the central meaning of the concept of natural law.

Interlude.

The positive law theorist may well accept the theses above mentioned. He may admit that what is traditionally called "natural law" has a legitimate function in the juridical experience, that the

---

[8] Although without any reference to natural law, Alan Gewirth affirms that human rights have their rational foundation in the necessary condition of human action; see his *Human Rights: Essays in Justification and Application* (Chicago and London: Chicago University Press, 1982), p. 66.

notion of natural law may be legitimately conceivable in theoretical terms, and that natural law belongs to the genus "law" as one of its theoretically possible species. He might even concede that sometimes it may be useful to resort to a jusnaturalistic reasoning in order to explain certain juridical phenomena. But in the end he will insist upon denying the *true*, real, juridical nature of natural law. For him natural law will be a law only from a lexical point of view or in terms of its purely abstract and theoretical thinkability.

Accordingly, a juspositivist will think that something more solidly grounded than natural law is needed in order to exert a critical evaluation and guidance of positive law as well as for providing justification and foundation to some of its aspects. What can be thought only in abstract terms and is therefore purely imaginary could be used to guide the theory and practice of law only by way of a mystification. Surely that might even be useful (as Machiavelli teaches), but in any case would lead us outside the scientific realm, since it would mean counterfeiting the truth.

This is in the main the point of view of juspositivism. It cannot, however, be disputed that many people, even today, believe that a *Soll-Satz* becomes a *Soll-Norm* only when its binding nature can be demonstrated by way of rational argumentation; and further still they will respect such a norm only because reason provides its grounding. To object that such a point of view has a moral instead of a juridical basis is not enough to disprove the point. In fact, as Hart has admitted, morals and law, though conceptually different, are not totally unrelated but are connected at least by some elementary links.[9] More radically, Olivecrona has affirmed that there are no fundamental differences between moral and legal norms.[10] To say that a norm becomes juridical when it is formalized and sanctioned within a juridical system is not an answer. It remains still to be explained why such a system has a juridical nature. Leaving aside this point, we cannot in any case overlook the fact that quite a number of people claim in court that rules based upon reason have to be acknowledged and declared valid for everyone.

---

[9] H. L. A. Hart, *The Concept of Law* (London: Oxford University Press, 1961), chap. IX.

[10] Cf. K. Olivecrona, *Law as Fact* (London: Oxford University Press, 1939), chap. I.

This is a good proof that they are believed to be juridical, and not only moral, norms.

Once more, positive law theorists will reply that such a belief is naïve and *unscientific*. It is none the less real, and an unprejudiced science cannot avoid taking it into account. Or is it not perhaps that the juspositivist, who is such a severe critic of natural law, becomes a bit uncritical when it comes to positive law? This is the point that now deserves to be examined.

5. Neither the lawgiver's authority nor the sanction or the regulation of force are sufficient to ground the obligatoriness of positive law.

I have said before in a tentative way that, within the genus "law," positive law can be distinguished from natural law because it is a *positum* (*ius in civitate positum*). It is time now to examine more closely this point, and in particular to discuss the binding nature of law, that is, what makes of a *Soll-Satz* a *Soll-Norm*, of a prescriptive *proposition* a normative *prescription*. By virtue of what does the *positio* of a norm make it obligatory? Let us remember that among different patterns of behavior all actually possible, a norm chooses the one that *ought* to be followed. From a *material* point of view, to give a false testimony is as possible as to give a truthful one; that someone who is recognized to be guilty of a crime be acquitted by a court is as possible as that he be condemned. But positive law forbids false testimony and does not allow judges to acquit someone whose guilt has been ascertained. Why has the choice made by the lawgiver a normative nature, which means that it is binding and therefore ought to be accepted?

The answer to this question given by juspositivists depends on the definition they give of positive law. Nineteenth century doctrines of positive law focused their attention on sanction, i.e., the possibility of resorting to coercion when a norm is violated. They were, however, not so naïve as to believe that coercion alone could explain the binding nature of positive norms. Coercion may produce compulsion and submission but is not by itself the source of an obligation. Moreover, force is not fully dependable since it must submit itself to the "loi du plus fort"; and who is the strongest can be determined only in the ever-changing game of real life. Thus there would never be anything that could be accounted as obligatory. For this reason nineteenth century juspositivists defined as (positive) law what was

declared as such by a legitimate authority and enforced through a sanction. The final foundation of the juridical (and binding) nature of norms is thus political authority, be this the "sovereign" of John Austin, the "general will" (more Hegelian than Rousseauian) of Thon, the "judges" of Holmes or of Ross, the "institution" of Maurice Hauriou or Santi Romano; but also the "Fathers of the constitution" of Kelsen (in his American period at least, which to my judgement suffers from some measure of eclecticism). But such a thesis is philosophically very weak.

The first point to be stressed is that, according to this perspective, the juridical nature of positive law is derived from something external to it (a weakness that more recent positivist theorists have now acknowledged). This means that a juridical norm is not obligatory per se (intrinsically) but because of a decision of the political authority. It is true that in the course of history a great number of normative propositions have either acquired or lost their binding character through the decisions of political authority; but the fundamental question is to know whether this depends *exclusively* on the arbitrary will of the authorities. My answer is firmly negative.

My thesis is that the lawgiver's authority establishes the binding character of the norms only in a *presumptive* way. Clearly this is a very strong and widely accepted presumption, since normally the lawgiver can count not only upon sheer *power* but also upon *authority*, based upon the evidence of its capacity to rule and the consequent trust of the citizens. Authority in fact is usually defined as an acknowledged and accepted power. However, the ruling ability may fade and disappear and the citizens' trust vanish; authority therefore can offer only a presumption of the binding nature of norms. Only if the normative propositions look coherent and functional with respect to their end will such a presumption hold. Otherwise the presumption will fail and the norms, being based only upon their sanction, will soon be perceived as *imposed* rather than *obligatory*.

In normal life the lawgiver is well aware of this alternative. He knows that his task is not to formulate intellectually elegant and logically faultless *Soll-Sätze*, but rather *Soll-Sätze* that are likely to be accepted as binding, i.e., as *Soll-Normen*. In order, therefore, to assure their binding character, he will not only enact the norms but also look for a justification of them. I will come back to this

point later on, but let me give here at least an example. Let us think for instance of a norm, by no means imaginary, saying that "children must denounce parents whose political opinions contradict those of the government." The lawgiver is aware that, in spite of all his authority and the effectiveness of his repressive apparatus, the common feeling will judge such a norm arbitrary and aberrant, deny its binding nature and at most submit to it as an *imposition.* For this reason the lawgiver will make an effort to find and to propagate a justification suitable to convince that the denouncing of parents is required for the preservation of state security, ideological orthodoxy etc., so that the prescription could be accepted as a (binding) norm.

We have thus reached some conclusions concerning the first point. We have seen that the deontic structure of the ought-statements was not enough to give them a binding character. We may now add that this cannot be derived from the authority of the lawgiver.

Present-day theory of positive law avoids defining juridical norms through *external* elements, therefore it seems more well-grounded and rigorous. According to its definition, law is a system of norms "providing for a sanction" (Kelsen), or "rules about force" (Olivecrona), or "rules concerning the exercise of force" (Ross). In its essence this is the point of view agreed upon both by normativists as Kelsen and Norberto Bobbio, and realists as Olivecrona and Ross.[11]

Thanks to this definition the theoretical distinction between natural and positive law would be established in a definitive way by discriminating their addressees and their specific content. Natural law norms are addressed to private individuals and direct their behavior; positive law norms are addressed to the officials of the public apparatus (judges, civil servants, policemen, etc.) and regulate conditions and limits in their exercise of force. But the end of such a definition is not actually to clarify the difference between natural and positive law. Its final purpose is to refute the juridical nature of the former. In fact, since the regulation of the exercise of force is not (at least for the above mentioned theorists) something simply *added* to the juridical norm in order to guarantee its effectiveness, but is *the specific content* of law, i.e., the element by which a norm *is* juridical, natural law is then clearly not "law." It is probably

[11] For a clear account of this position, cf. N. Bobbio, "Law and Force," *The Monist,* 49 (1965): 321–341.

possible to discover some kind of sanction, implicit or explicit, in the norms of natural law, but in any case its specific content lies in the prescription of behavior, to which a sanction is a pure subordinate instrument. Natural law cannot be conceived as reduced to the regulation of the exercise of force; therefore, according to the previous definition, it is not truly a law.

From this point of view the whole question of the transformation of a *Soll-Satz* into a *Soll-Norm* would find an extremely simple solution. A *Soll-Satz* does not have to prove its binding nature in order to become a *Soll-Norm*: it is a *Soll-Norm* if, and only if, its content is the regulation of force. It could even be conceded to an obstinate jusnaturalist that what he calls natural "law" may formulate *Soll-Sätze*, but the only value of this concession would be on the level of purely abstract theory.

Nevertheless, the problem of the binding nature of norms is not so easily disposed of. As it concerns citizens in general, it cannot but arise also for the officials of the public apparatus. Why must they accept as obligatory the rules on the exercise of force that are addressed to them? Are they complying with them only in order to avoid the possibility that other rules about the exercise of force be applied against them? If that was the case, even leaving aside the question of the *regressio ad infinitum*, the whole argument would fall under the above mentioned criticism: people would behave according to the norms not because of an obligation but only under the threat of coercion. Or are they complying because of the oath that they have sworn to obey the orders of the authorities? In that case, what they consider binding are not the norms but the oath, that is to say, a personal pledge. And finally, why should the citizens themselves acknowledge as obligatory a behavior which, if not observed, would be the factual presupposition of the application of the rules concerning the exercise of force? Only if their binding character received some justification could such rules avoid being taxed with arbitrariness.

The conclusion then is that the definition of law as a rule concerning the exercise of force, far from removing the question of its binding character, proves once more its fundamental importance. The rules on the exercise of force need, even more perhaps than other rules concerning behavior, to be justified. It is not enough to regulate force in order to change it from a source of coercion into a source of obligation. Even in this case the rule must be given a justification. For this reason the Scandinavian legal realism comes

to the point of saying that in fact the rules concerning the use of force have a *legal* nature because, coming from an accepted authority, they are perceived as socially binding. But this is to propose again the point of view we have criticized above: authority provides only a presumption of the binding nature of rules.

6. Between natural law and positive law there is not an opposition of principle but a continuity.

If what I have said until now is correct, and in particular if in order to define the law it is essential to draw a distinction between prescription and imposition and between obligation and compulsion, the conclusion we have reached is that law in its reality cannot be identified only by the *positio*, with everything this term implies internally and externally (i.e., regulation of force and lawgiver's authority). Unless one considers positive rules as self-evidently binding . . . but this would be so clearly a mistake I do not have to discuss it.

In order to avoid any possible misunderstanding, I want to make it clear that what needs to be justified is not the obedience to the norm, but the norm itself. A number of different motivations, either personal or social, may provide a justification for obedience. But this is not enough to prove the binding nature of the norm itself. Self-interest or fear, ambition or loyalty, etc., all can explain obedience to a norm which at the same time is judged to be arbitrary, useless, damaging (and therefore not obligatory) by the same person who nonetheless follows it. The justification which the law requires concerns the prescriptive content of the norm, whose rational foundation it must prove.

The result of such a justification does not need to be unanimous and unvariable compliance with the norm, but rather the fact that, in principle at least, its prescription cannot be refuted, and will therefore be acknowledged as binding. Of course, the actual possibility of transgression will not be avoided. However, the binding nature of the law being accepted, any transgression will be perceived, even by the transgressor itself, as an illegitimate act instead of a legitimate or indifferent one. An important consequence can be drawn: since the justification of the norm implies the illegitimate nature of the transgression, it justifies also, at least in principle, the sanction against the illegal action.

But if, in order to establish the binding character of a positive

norm, a justification is needed, it follows that the latter becomes the first source of the former. Consequently, since the justification is a matter of rational argumentation, both positive and natural law will in the end draw from the same formal source their binding strength: the rational character of their prescriptions. At an earlier point I have stated that natural and positive law share two common elements: the deontic nature of their propositions and the binding character of their prescriptions. I have, however, accepted, but only in a provisional way, the common opinion that the two species of law may be distinguished on the basis of the different sources of their binding nature: the rationality of prescriptions in one case; the *positio* in the other. By now it has become clear that in any case the *positio* cannot avoid the necessity of a justification. On the contrary it requires it, if it is to produce a juridical rule and not a mere imposition. We may then add a third common element to the first two: the same source of their binding nature. The two species of law, so often opposed to one another, can thus be reconciled.

Reconciling them does not mean, however, to unify them. The distinction between them cannot be overcome since it is grounded, in my opinion, in their different degrees and types of justification.

This point needs some further exploration. The most satisfactory (even if not always the *simplest*) way for justifying a norm (and thus insuring its binding character) is to show the functional relationship between the prescribed behavior and some accepted end. Kant's hypothetical imperative—which prescribes an action not because it is good in itself, but as a means toward a given end—is binding on the ground of its functional justification. Let us take for example the following hypothetical imperative: "If workers want to protect their interests, they must join a labour union." Well, if it were proved with enough certainty that workers' interests cannot be protected except through labour unions, then the norm "all workers ought to join a labour union" would be justified and would acquire a binding nature.

However, such a justification holds only for those directly concerned: in our case, the workers. Out of this socio-existential context this norm is neither justified nor binding. Nevertheless the justification process is not brought to an end because of this. On the contrary, it can go beyond the boundaries of the first context and be extended to a larger one including also the first. Using again the same example, to prove that the protection of workers' interests

is functional to the common good of the body politic will be enough to justify the above mentioned norm through a consistent chain of reasoning. Therefore, the citizens not concerned with this norm (i.e., the non-workers) ought to recognize it as obligatory for the workers. The justification of a whole system of norms can be accomplished precisely through such a chain of justifications.

All this may look at first rather abstract; but it is exactly how things work in reality. It is particularly so in the democratic regime where first the parliamentary debates, and then the interpretation of independent judges, verify the justification of the norms proposed by the lawgiver. Moreover, the justification of the prescriptive content of a norm is not the only element explaining its binding character. We might say that it is at the center of a network of reciprocally connected justifications. First of all, it is connected (as to a necessary precondition) to such a justification of the attribution of the law-making power to a certain institution, which can give to the latter the accepted authority that can provide (as we have seen) a legitimate presumption of the binding character of its normative outputs. In its turn, the justification of the norm is required in order to justify the adequate sanction applicable to a violation of the norm, because the mere fact of establishing a sanction or a "rule about force," is neither self-justifiable nor sufficient to ground the binding nature of legal norms, for that would imply the Is-Ought inference. On the contrary, the sanction can be legitimated by its functional relationship with the behavior prescribed by a norm already justified.

In any case, the justification of the norm is, both from a logical and from an empirical point of view, the crucial element for establishing the binding nature of the laws since it enables us, on one side to verify the presumption offered by the authority, and on the other side to ground the legitimacy of the sanction. It is on the basis of this first justification that the others attain a full validity and thus define together the binding situation that is typical in the real legal experience.

As positive law, according to Kelsen's well-known suggestion, may be interpreted through the hypothetical scheme "if . . . then," the functional justification, which I have just mentioned, would be enough to provide a rational ground for establishing the binding nature of positive norms. However, as is evident, the hypothetical imperative and its functional justification are valid only for those who accept unconditionally the context to which both the imperative

and its justification are related. With reference to the above mentioned example, there might be workers who do not think of their interests as paramount or citizens who subordinate the common good to higher values. To these cases can be applied Hare's criticism of J. R. Searle's thesis on the *promising game* showing the normative implication of an act of promise: for those who refuse to "play the game" the functional justification of the norm does not involve an obligation.[12]

The basic idea of the natural law doctrine is precisely to find (and to justify) a set of norms that are related to a context that cannot be rejected. That is why this doctrine takes its name from the concept of a *natural* law, i.e., a law related to a universal context concerning man only as a human being, independently of any particular condition (sexual, racial, political, cultural, etc.). This does not mean forgetting or effacing specific conditions but only treating them as specifications within a universal context. In our planetary age, when it has become clear that we are all part of the same mankind and share the same destiny, it seems to me absurd and anachronistic to deny the existence of a common human context and to reject a law related to it.

In my opinion, however, the real problem is not that of accepting or rejecting this premise, but rather that originating from the common belief that it is impossible to justify (and thus to consider obligatory) norms related to the global context of the whole mankind. If the obstacle is an empirical and practical one, it is right to point it out: in fact we do not have yet an effective and impartial mechanism to enforce this type of norm. But the theoretical difficulty is not impossible to overcome: indeed it is my firm belief that it is possible to justify the binding character of norms that are addressed to the generality of mankind, i.e., to that "universal audience" about which Perelman so appropriately speaks.[13]

To this end some of the theoretical tools developed by Kant are still valid. I have just mentioned, however generically, the concept of the hypothetical imperative. As is well known, Kant distinguished two types of it: the problematic or technical imperative, related to an end we are free to choose; and the assertive or

---

[12] The well-known Searle and Hare papers are collected in W. D. Hudson, ed., *The Is-Ought Question* (London: Macmillan, 1969), pp. 120–134, 144–156.

[13] See Ch. Perelman et L. Olbrechts-Tyteca, *Traité de l'Argumentation* (Paris: Presses Universitaires de France, 1958), sections 6–9.

pragmatic imperative, related to an end shared by everybody, and which is not therefore subject to the *arbitrium indifferentiae.* The formula of this imperative is the following: "since everyone wants . . . everyone ought."

In the case of the assertive imperative, the existential context considered has a universal character, and the end pursued is not arbitrary (as the "game" of J. R. Searle) but real. It becomes then possible to justify in a universal way norms that are functional to an end which is really pursued by everyone. Kant, however, suggested an example that raises some serious doubts: the search for happiness (*Glückseligkeit*). Now it is true that everybody seeks happiness, but in this example what is really universal is the fact that *everybody seeks his own individual happiness.* And since the many individual happinesses are not necessarily the same, the functional justification of behaviors related to the search for happiness has only an individual validity and cannot be made universal.

Nevertheless, a counter-example does not necessarily invalidate an argument. What prevents behaviors functional to the realization of happiness from being universally generalized is the fact that happiness refers to the individual existence of men and not to their *co-existence.* On the contrary, a behavior functional to the human *co-existence* can be made universal since it can be reciprocated without any incompatibility. Consequently, the justification of the norm prescribing it will prove its binding nature vis-à-vis a universal audience. We might consider, for instance, the case of *the respect due to the innocent:* everyone who is innocent expects for himself such a respect; and since this respect can be reciprocated, there is no incompatibility to its universalization. Moreover, such a respect is functional to co-existence. In fact, if the criterion of innocence were denied, human co-existence would become unthinkable. Every offence and violence would be allowed and there would be no chance of discriminating them because they would fall under the *arbitrium indifferentiae.*

The specific element of the natural law doctrine is this universal justification, which makes of a *Soll-Satz* a *Soll-Norm* obligatory for everybody. The difference between natural and positive law can receive then the following formulation: the norms of the first are justified on the ground of their functional relationship with a *universal* co-existence; those of the second are justified on the ground of their functional relationship with the different contexts of *particular* co-existence: regional, national etc.

No doubt, it is a relevant difference, but dependent only on the empirical context of reference of the justification; therefore that does not imply either a structural difference of the two laws or an inevitable (but only possible) opposition between their prescriptions. Moreover, the universal context of natural law does not imply the negation of the particular contexts that are the usual field of positive law; but, by transcending them, it prevents them from being absolutized, which would produce a situation of conflict unsolvable in principle, as it appears in Hegel's political philosophy.[14] In this sense, it seems legitimate to say that natural law is also the *ought* of positive law, since what is particular can neither deny nor totally separate itself from the universal.

A final point has to be clarified. It cannot be disputed that in real life co-existence is always imperfect, being continually troubled by conflict, but conflict can never eliminate every sort of co-existence: St. Augustine had already underlined this in his *De Civitate Dei.*[15] Co-existence and conflict have from a *factual* point of view the same possibility. But, if we consider them as conditions of human life, then a fundamental difference becomes clear. While a universalized observance of co-existence would remove every conflict and grant the chances of life to everybody, the universalization of conflict, by eliminating any situation of co-existence, would deny such chances. That means that co-existence, and not conflict, is the logical condition of a truly human life. It follows then that it can not fall under the *arbitrium indifferentiae.*

Moreover, within the context of the observance of global co-existence, undeniable human differences will not produce conflict but dialogue, which substitutes reason for force. This is precisely the specific character of natural law according to jusnaturalists. But it is also an element which positive law, if it wants to keep its binding character, should not lack.

University of Rome

---

[14] Where not the law, but only war, and finally the *Weltgericht* of the *Weltgeschichte,* can solve the conflict among States, cf. *Grundlinien der Philosophie des Rechts,* sections 338–340.

[15] Cf. Augustine, *De Civitate Dei,* Bk. XIX, 14–20, where wordly peace is presented as a dialectic between concord and discord.